(25)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 470.

THE UNITED STATES,
Appellant,

vs.

JOHN J. MITCHELL, *et al.*, as Executors of the Last Will and Testament of DeLora R. Gates, deceased,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR APPELLEES.

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Authorities Cited.

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BRIEF FOR APPELLEES.

Opinion Below.

The Memorandum Opinion of the Court of Claims is reported in 60 Ct. Clms. 451.

Grounds of Jurisdiction.

The grounds of jurisdiction are as stated at page 1 of the brief for the United States.

History of the Case.

This is an appeal by the United States from a judgment of the United States Court of Claims rendered on March 23, 1925, in favor of the appellees for $905,225.73 and interest thereon, less a certain offset of $381,931.57, with interest thereon (R. 47).

The petition was filed in the Court of Claims on December 6, 1923 (R. 1).

The suit was brought to recover the amount of income taxes for the year 1919 amounting to the said sum of $905,225.73 illegally assessed and collected from the estate of which the appellees are the surviving executors.

In the absence of demurrer, plea or answer to the petition, a statutory general traverse was duly entered under Rule 34 of the Court of Claims (R. 40).

The suit was brought by the appellees, John J. Mitchell and Augustine L. Humes, and by Charles E. Herrmann, as the executors of the estate of Dellora R. Gates (R. 1). On January 8, 1925, upon the argument of the case and the submission thereof on the merits, the death of Charles E. Herrmann, one of the claimants, was suggested and leave was thereupon granted by the Court of Claims to proceed in the names of the surviving claimants, the appellees (R. 40).

The case was heard on an agreed statement of facts (R. 40).

On January 26, 1925, the Court of Claims filed findings of fact and conclusions of law (R. 40).

On March 23, 1925, the Court of Claims entered the judgment from which this appeal is taken (R. 47).

Statement of Facts.

Two claims or causes of action are set forth in the petition. The facts in relation thereto we shall state separately:

Facts Relating to the First Claim or Cause of Action.

The decedent, a resident of Texas, died on November 28, 1918 (R. 41). The will was probated in the County Court of Jefferson County, Texas, on January 6, 1919; letters testamentary were issued on the same day and the Executors qualified and remained Executors down to the time of the filing of the petition (R. 41).

On November 28, 1919, one year after the decedent's death, as required by law, the Executors filed an estate tax return showing an estate tax of $2,927,762.64 payable to the United States (R. 42).

On March 14, 1920, the Executors filed a return of all the income "*received*" by them as executors during the year 1919 (R. 40).

The income tax computed upon the amount of the income so "*received*" as set forth in the return, without any deduction for "estate tax", amounted to $905,225.73 (R. 43).

On March 14, 1920, when the income tax return was filed, the regulations and rulings of the Commissioner of Internal Revenue and the Secretary of the Treasury forbade and refused to allow any deduction of any part of the "*estate tax*" in computing taxable income

(R. 43). At that time neither the decision of the Court of Claims in *Woodward* v. *United States* (56 Ct. Clms. 133) nor the decision of this Court in the same case, *sub. nom. United States* v. *Woodward* (256 U. S. 632) had been rendered (R. 43).

The instructions printed on the income tax return for the year 1919 under the heading: "I. *General Deductions*", (p. 2 of Instructions; R. 39) expressly inhibited deduction of the "estate tax" in the following words:

> "Do not include Federal income taxes, *nor estate or inheritance taxes.*" (Italics ours.)

Accordingly, the Executors made no deduction of the "estate tax" in their income tax return (R. 43), but payment of the income tax for the year 1919, amounting to $905,225.73, was made by the Executors under protest (R. 43).

If the estate tax, amounting to $2,927,762.64, had been allowed by the regulations and rulings as a deduction in computing the income tax payable with respect to income received during the year 1919, neither the Executors nor the estate would have been chargeable with any income tax on income received during that year.

Payment of the income tax for the year 1919 was made by the Executors to avoid the imposition of penalties and interest and distraint or other proceedings for the enforcement and collection of taxes consequent upon the failure or refusal to pay the tax as computed in accordance with the regulations and rulings then in effect (R. 43).

The executors paid the estate tax in the year 1920, $1,000,000 thereof on February 25, 1920, and the balance, $1,927,762.64, on May 27, 1920 (R. 43).

On January 6, 1922, the executors duly filed an application for refund of the income tax so paid by them for the year 1919 (R. 44).

Notwithstanding the decision of this Court in *United States* v. *Woodward, supra,* the application was denied (R. 44).

The Commissioner of Internal Revenue offered to allow the executors to deduct the estate tax in computing the income tax payable by them with respect to the income of the estate received by them during the subsequent year 1920. The executors refused the offer and insisted upon their right to deduct the estate tax from the income received by them during the year 1919 (R. 44, 45).

Facts Relating to the Second Claim or Cause of Action.

During the year 1919 there not only became due and payable by the executors, but the executors in fact paid on May 27, 1919 (R. 45), an inheritance tax imposed by the State of Texas amounting to $357,739.34.

No deduction therefor was made in the executors' income tax return for the year 1919 because the regulations and rulings of the Commissioner of Internal Revenue and the Secretary of the Treasury expressly forbade the making of the deduction (R. 45).

On January 6, 1922, the executors duly filed their application for refund of income tax for the year 1919 on the ground that the inheritance tax both so accruing

and paid to the State of Texas in the year 1919 was deductible in computing the income tax for that year. The application was denied (R. 45, 46).

The Questions Presented.

Two questions are presented as to the deductibility of taxes in computing the net taxable income for the year 1919 under the Revenue Act of 1918.

One of these questions is whether the Federal estate tax which, under the authority of the decision of this Court in *United States* v. *Woodward, supra,* accrued and became due on November 28, 1919, was deductible from income received by the executors during that year, 1919, although it was not paid until the following year, 1920.

The deductibility of the Federal estate tax is admitted in the Government's brief (p. 2). The controversy relates solely to the year in which the deduction should be taken, whether in the year 1919 when the tax accrued and became due and payable, or in the year 1920 when it was paid.

The *Government states* that this question arises "in a case where" the executors' "method of accounting and income tax return was on a receipts and disbursements basis, as distinguished from the accrual basis."

This assumes, *without foundation therefor in the record,* that in this case the executors' method of accounting and income tax return was on a so-called "receipts and disbursements basis". This also assumes without argument that the law prescribed definitely

the two distinct bases of accounting and income tax return to which the Government refers. There is nothing in the record showing that the executors made their return upon a "receipts and disbursements basis". The record shows only that the executors returned the gross income "received" by them and that they were *forbidden* by the regulations and rulings then in effect to deduct the estate tax from income *whenever received.* The executors' return of income for the year 1919 shows, as stated in the Government's brief (p. 6) that the following instruction was printed thereon: "Write 'R' if this return shows income received or 'A' if it shows income accrued." The executors wrote in the space provided for the answer the letter "R". Thus the executors stated only that they were making a return of the gross income "received" by them. This did not amount to a statement either that they kept books or made their return upon any so-called "cash receipts and disbursements basis". It was not then permissible pursuant to the regulations for them to deduct the estate tax from the income of any year. The Government states in its brief (p. 14) that "it must be assumed that the basis used in the return was the basis on which" the executors' "accounts were kept". The return, therefore, satisfied any question of the burden of proof by showing that the executors kept accounts of income received and that they did not deduct the estate tax, the deduction thereof being forbidden. This Court undoubtedly understood the *Woodward* case in the same way, where precisely the same proof appeared in the record.

Nor is there any foundation in the law for the con-

It means that they made their return on
basis of income received in the year

clusion assumed without argument by the Government that the law contemplated or required a "receipts and disbursements basis". As we shall hereinafter contend, the law contemplated that particularly in the case of estates executors should have the right to deduct from income received by them taxes which had become due and payable.

The *second question* relates to the deductibility from gross income *"received"* by the executors in the year 1919 of the inheritance tax which both accrued and was paid to the State of Texas in the year 1919. As stated in the Government's brief (p. 2), there is no controversy regarding the year in which the deduction should be allowed if it is to be allowed. As there stated, the question is whether the Texas inheritance tax is deductible by the executors or by the legatees or distributees in their individual income tax returns.

SUMMARY OF ARGUMENT.

I. The facts in the case of United States v. Woodward, 256 U. S. 632, are identical with those of the instant case, and this case is governed by the decision of this Court in the Woodward case.

II. The re-enactment by the Revenue Act of 1921 of the provisions of the Revenue Act of 1918 with respect to the deductibility of taxes paid or accrued within the taxable year was a legislative approval and adoption of the construction placed upon the Revenue Act of 1918 by this Court in the Woodward case and of the construction subsequently placed thereon by the Treasury Department in accordance with that decision of this Court.

III. The executors had the right to deduct the estate tax for the year 1919 in which it accrued.

(1) The intention of Congress to permit the deduction in the year in which the estate tax accrued is shown by the changes made by the Revenue Act of 1918 in corresponding provisions of the prior Revenue Acts of 1913 and 1916.

(2) The right conferred by Section 214(a) (3) to deduct the estate tax in the year in which it "accrued" is not limited by any other provision of the Act.

(3) The law justified no such sharp line as that insisted upon by the Government between a so-called "cash receipts and disbursements basis" and a so-called "accrual basis".

IV. The Texas Inheritance Tax should be permitted as a deduction.

ARGUMENT

I.

THE FACTS IN THE CASE OF UNITED STATES v. WOODWARD, 256 U. S. 632, ARE IDENTICAL WITH THOSE OF THE INSTANT CASE AND THIS CASE IS GOVERNED BY THE DECISION OF THIS COURT IN THE WOODWARD CASE.

To demonstrate that this case is identical in substance with the *Woodward* case we make the following analysis of the two cases.

(1) *The Revenue Act imposing the income tax was the same in each case.*

The act of February 4, 1919 (Revenue Act of 1918) was in effect for income tax purposes from January 1, 1918, to January 1, 1921. Therefore it was effective for the year 1918 (the year involved in the *Woodward* case [256 U. S. at p. 633]), and for the year 1919 (the year involved in the instant case [R. 42, 43]).

(2) *The Revenue Act imposing the estate tax was the same in each case.*

The act of September 8, 1916 (Revenue Act of 1916) as amended by the act of October 3, 1917 (Revenue Act of 1917) was effective as to the estates of all decedents dying between October 3, 1917 (the date of the passage of the Revenue Act of 1917) and February 4, 1919 (the date of the passage of the Revenue Act of 1918).

The act was therefore effective as to the estate of Mr. Woodward who died on December 17, 1917. (256 U. S. 632 at p. 633.)

The act was also effective as to the estate of Mrs. Gates who died on November 28, 1918 (R. 41).

(3) In the *Woodward* case the estate tax accrued and became payable one year after the decedent's death, namely, on December 17, 1918.

This Court said in that case (256 U. S. 632, at p. 635), referring to the estate tax:

> "*It becomes due not at the time of the decedent's death,* as suggested by counsel for the Government, *but one year thereafter, as the statute plainly provides.*" (Italics ours.)

This Court then held that the estate tax which in that case accordingly accrued on December 17, 1918, was deductible from the income "*received*" by the Woodward executors during the year 1918.

Likewise in the *instant* case, the estate tax accrued one year after the decedent's death, namely, on November 28, 1919 (R. 41), and the estate tax was accordingly deductible from income "*received*" by the Gates executors during the year 1919.

(4) The estate tax in the *Woodward* case was held to accrue in 1918 (one year after the decedent's death) and to be deductible by the Woodward executors from income "*received*" by them in 1918, although not paid until the following year, 1919. Likewise in the *instant* case, the estate tax is deductible by the Gates executors from income "*received*" by them in the year 1919, although not paid until the following year, 1920.

This Court said in the *Woodward* case (256 U. S. 632, at p. 633), referring to the estate tax:

> "The tax became due December 15, 1918, and" the executors "paid it February 8, 1919."

The estate tax in the instant case was paid by the executors in the year 1920. On February 15, 1920, $1,000,000 was paid, and on May 27, 1920, the balance of $1,927,762.64 was paid (R. 42, 43).

(5) *In each case the executors were forbidden to deduct the estate tax.*

The Court of Claims said in the *Woodward* case (56 Ct. Clms. 133, at p. 144) that the "Commissioner of Internal Revenue refused to allow said deduction".

At the time the Gates executors made their income tax return for 1919 the regulations and rulings forbade the deduction (R. 42, 43).

(6) *In each case the executors included in their income tax return only income received by them.*

The Government states in its brief (p. 15) that the Woodward executors filed a return of income "*received*". In that case this Court held that from the income so "*received*" could be deducted the estate tax which accrued and became payable in that year, although not paid until the following year. Therefore the Government must contend that the decision of this Court was wrong, for the Government also states in its brief (p. 18) that the Woodward executors were not entitled to deduct the estate tax which accrued and became payable in the year 1918 unless they not only

returned income "received" but also income "accrued" though not "received".

We do not believe that the Solicitor General in the *Woodward* case or counsel for the Woodward executors or the Court of Claims or this Court thought for a moment that the executors in the *Woodward* case were accruing their income. The petition, the findings of fact, the briefs and the opinion of the Court of Claims abound with statements showing without question that *everyone concerned in the case clearly understood that the Woodward executors reported only income "received"* for the year 1918 and that they sought to deduct the estate tax which accrued and became payable in that year *although it was not paid until the year following.* We believe that the decisions of this Court and of the Court of Claims were rendered with the clearly understood intention of permitting this deduction to be made under the circumstances so clearly appearing.

It appears from the *Transcript of the record* in this Court in the *Woodward* case that it was found as a fact that the Woodward executors reported only the income *"received"* by them. Thus it was there found that the executors "during the year 1918 and prior to the 21st day of December, 1918, *collected*" the income returned (p. 8); that the gross amount of income "*received* by the executors from the said estate for the year 1918 was less than the amount of the said estate tax" (p. 9) and that the executors "during the year 1919 * * * made and filed * * * a return of all the income *received* during the year 1918" (p. 9). (Italics ours.)

The *brief* of the Solicitor General before this Court in the *Woodward* case stated that the executors reported "income *received*" or "*collected*" during the year 1918 (from which the executors sought and were permitted to deduct the estate tax which accrued and became due in that year).

At page 2 the Solicitor General, in his brief in the *Woodward* case, said:

> "In March, 1919, the executors made an income tax return and reported the *income received* by them for the estate prior to December 21, 1918. The will had been probated and the executors qualified on December 21, 1917. They appear, therefore, to have included in this return the *income received* during a period of one year following their qualifications." (Italics ours.)

Again, at page 8 of his brief in the *Woodward* case, the Solicitor General said:

> "It has been stated above that the income *reported* by the executors for the year 1918 was that *collected* up to December 21, 1918, or the expiration of one year from the granting of letters testamentary." (Italics ours.)

In the brief of the attorneys for the Woodward executors (p. 15) reference was made to the income returned by the executors as "*income received*" and as "*income collected*". (Italics ours.)

Of course, both this Court and the Court of Claims clearly understood these facts which were stated in the case over and over again.

Judge Downey in delivering the opinion of the Court of Claims said (56 Ct. Clms. 133, at p. 144):

> "* * * during the year 1918 and prior to the 21st day of December of that year they *collected* income and earnings from the property and assets of the estate * * *. * * * the executors made and filed * * * a return of the *income received* by them during the year 1918 * * * and in said income tax return they claimed as a proper deduction under the provisions of Section 214 of said Revenue Act the amount of said tax which had been paid by them to the Collector of Internal Revenue on the *8th day of February, 1919.* * * * the action is brought for the recovery of the full amount of the income tax paid *for the year 1918.* But the question is as to the right to deduct from the income tax *for that year* the estate tax which *accrued* during the same year irrespective of the relative amounts." (*Italics ours.*)

Mr. Justice Van Devanter in delivering the opinion of this Court said (256 U. S. at page 633):

> "Under that act these executors were required to pay an estate tax of $489,834.07. The tax became due December 15, 1918, and they paid it February 8, 1919. Shortly thereafter the executors made a return, under the Revenue Act of 1918, of the income of the testator's estate for the taxable year 1918 and claimed in that return that in ascertaining the net income for that year the estate tax of $489,834.07 should be deducted."

As in the *Woodward* case, so in the *instant case,* the executors reported the income *"received"* by them dur-

ing the year in question. The Court of Claims found (R. 42) that as required by law the executors "made and filed with the Collector of Internal Revenue at Albany, N. Y., a return of all the income *received* during the year 1919 by said executors in their capacity as executors of the estate of said Dellora R. Gates, deceased." (Italics ours.)

From the above analysis it appears that the *Woodward* case and this case are identical with respect both to the facts and the law applicable thereto.

The facts in the two cases as to tax liability are precisely the same. In each case the executors rendered "a return of all income *received* during the year"; in each case the estate tax accrued, that is, became due and payable during that year; in each case the estate tax was paid in the following year and in each case the income tax was paid for the year after the decedent died without the deduction (which the Commissioner refused to allow) of the estate tax which accrued in that year.

The only distinction between the two cases, which does not amount to a difference, is that the *Woodward* executors claimed the deduction in their income tax return, which at that time in 1918 they were not forbidden to do by any theretofore announced ruling of the Commissioner of Internal Revenue, and the deduction made was thereupon denied by the Commissioner, *whereas* the *Gates* executors paid their tax under protest and did not claim the deduction, it being then, in 1919, expressly forbidden by previous rulings made by the Commissioner, and thereupon filed a claim for

refund after the decision of this Court in the *Woodward case*. If the Gates executors had taken the deduction in their return they would have run the risk of severe penalties, because at that time the regulations expressly forbade any such deduction. The claim for refund made by the Gates executors was based on the *Woodward* case, the facts in the two cases being identical, and was made in exact conformity to the decision in that case. In the *Woodward* case this Court said (256 U. S. 632, at page 635) that the estate tax in that case "not only 'accrued,' which means became due, during the taxable year of 1918, but it was paid before the income for that year was returned or required to be returned" in the year 1919. Therefore the Woodward executors were able to claim the deduction in their income tax return. In the *instant case* payment of $1,000,000 of the estate tax, out of the total of $2,927,762.64, was made on February 25, 1920 (R. 43), but the executors were not in a position to claim the deduction in their income tax return which was filed on March 14, 1920 (R. 42). They were then expressly forbidden by the regulations to make any deduction for estate tax.

This distinction, therefore, is unimportant. In each case the claim for the deduction was denied.

We respectfully submit that the decision in the *Woodward* case governs the instant case.

II.

THE RE-ENACTMENT BY THE REVENUE ACT OF 1921 OF THE PROVISIONS OF THE REVENUE ACT OF 1918 WITH RESPECT TO THE DEDUCTIBILITY OF TAXES PAID OR ACCRUED WITHIN THE TAXABLE YEAR WAS A LEGISLATIVE APPROVAL AND ADOPTION OF THE CONSTRUCTION PLACED UPON THE REVENUE ACT OF 1918 BY THIS COURT IN THE WOODWARD CASE AND OF THE CONSTRUCTION SUBSEQUENTLY PLACED THERE-ON BY THE TREASURY DEPARTMENT IN ACCORDANCE WITH THAT DECISION OF THIS COURT.

This Court determined in the *Woodward* case that under the Revenue Act of 1918 the estate tax was deductible as a tax "paid or accrued within the taxable year" and that executors may deduct the estate tax in computing income of the estate for the year in which the estate tax accrued and became due and payable, although not paid until the following year. The decision of this Court was not qualified in its application in terms or by implication.

The rule declared by this Court in the *Woodward* case was recognized by the Treasury Department in publishing the decision in Treasury Decision 3195 (*Cum. Bul.* 4, p. 153), promulgated under date of July 13, 1921, as follows:

> "INCOME TAX—REVENUE ACT OF 1918—DECISION OF SUPREME COURT.
>
> "*Deductions—Federal Estate Tax Paid by Executor.*
>
> "Federal estate tax paid by executors of an estate is an allowable deduction, under section

214, in ascertaining the net taxable income of the estate, for the year in which said estate tax 'accrued', which means became due."

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

"To collectors of internal revenue
and others concerned:

"The appended decision of the Supreme Court of the United States, dated June 6, 1921, in the case of *United States* v. *Alan H. Woodward, et al., executors of Joseph H. Woodward, deceased,* affirming the judgment of the Court of Claims, is published for the information of internal revenue officers and others concerned.

D. H. Blair,
Commissioner of Internal Revenue.

Approved, July 13, 1921:
A. W. Mellon,
Secretary of the Treasury."

The Commissioner of Internal Revenue, in his Annual Report to the Secretary of the Treasury for the fiscal year ended June 30, 1921, reporting on the important cases decided during that year, said, at page 195 of his report:

> "Federal estate tax paid by executors of an estate is an allowable deduction, under Section 214 of the Revenue Act of 1918, in ascertaining the net taxable income of the estate for the *year in which said estate tax 'accrued', which means became due.*" (Italics ours.)

In so promulgating the rule announced by the decision in the *Woodward* case, the Treasury Department and the Commissioner of Internal Revenue stated the rule without qualification as to its applicability. As so stated the rule was not limited by any provision or intimation that the deduction of the estate tax in the year in which it accrued and became due and payable could not be made unless, as now contended, some particular method of bookkeeping was employed by the executors.

The decision in the *Woodward* case having been rendered, and the rule announced therein having been so promulgated, Congress *thereafter* enacted the later *Revenue Act of 1921,* approved November 23, 1921. In so doing Congress re-enacted section 214 (a) (3) providing for the deductibility of "taxes paid or accrued within the taxable year" in practically identical terms with those used in the Revenue Act of 1918. Congress also re-enacted in identical terms the provisions of Sections 212 and 200 of the Revenue Act of 1918 upon which the Government relies in its brief herein (pp. 4, 5).

In debating the bill which became the *Revenue Act* of 1921 on the floor of the Senate the *Woodward* case which had been decided in June of that year was repeatedly referred to and the entire opinion of this Court was printed in connection with Senator Underwood's remarks (*Congressional Record, Vol.* 61, *Part* 6, *page* 5949).

Congress also included in the Revenue Act of 1921 the following further provision [Section 214 (a) (3)] showing that the *Woodward* case was in mind:

> "For the purpose of this paragraph, estate, inheritance, legacy, and succession taxes *accrue on the due date* thereof except as otherwise provided by the law of the jurisdiction imposing such taxes." (Italics ours.)

These words were added by an amendment proposed as follows on the floor of the Senate on October 25, 1921 by Senator Smoot, on behalf of the Committee on Finance:

> "In the past each case has come up to the Internal Revenue Bureau for decision, and now that bureau thinks Congress should specifically state just what course that bureau shall follow." (*Congressional Record, Vol.* 61, *Part* 7, *page* 6726.)

It thus appears that permitting the deduction of such taxes when accrued without qualification as determined in the *Woodward* case was satisfactory to the Bureau, or at least that the Bureau recognized the right to the deduction when accrued as given by the law. As pointed out later in this brief, it is not only highly unusual but improper for executors to report income not actually received.

If Congress had thought that there was any doubt about the desirability of the law as construed by this Court in the *Woodward* case, or had believed that there was any public policy which should lead to a change in the law as so construed, without qualification, Congress could readily have altered the law when it enacted the Revenue Act of 1921. So far from altering the law, the law was re-enacted and the above quoted provision was added that the date of accrual should be the "due

date", thus expressly sanctioning the decision in the *Woodward* case.

It is established by the decisions of this Court that the re-enactment by Congress of a statute which has previously received a certain construction, whether judicial or departmental, is an approval and adoption by Congress of such construction.

> *Provost et al.* v. *United States,* 46 Sup. Ct. Rep. 152, at p. 155 (decided January 4, 1926);
>
> *United States* v. *Anderson,* 46 Sup. Ct. Rep. 131, at p. 133;
>
> *Hecht* v. *Malley,* 265 U. S. 144, at p. 153;
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> *United States* v. *G. Falk & Bro.,* 204 U. S. 143;
>
> *National Lead Co.* v. *United States,* 252 U. S. 140;
>
> *Komada* v. *United States,* 215 U. S. 392;
>
> *United States* v. *Hermanos y Compania,* 209 U. S. 337;
>
> *New York, N. H. & H. R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361;
>
> *Copper Queen Mining Co.* v. *Arizona Board,* 206 U. S. 474;
>
> *Latimer* v. *United States,* 223 U. S. 501.

The Government insists that the estate tax was not deductible in the year in which it accrued and became due and payable, unless the executors rendered a return not only of income *actually received* by them but also of some kind of "accruals" of income not received by them. If the decision in the *Woodward* case and the

subsequent regulation of the Treasury Department be so limited, it follows that by re-enacting the provisions referred to of the Revenue Act of 1918, Congress only adopted and approved the decision of this Court permitting the deduction of the estate tax in the year in which it accrued, subject to the qualification that executors should render a return not only of income received by them but also of income which had accrued but which had not been received.

There are at least two answers to this.

In the *first* place the result would be to qualify the extent of the adoption and approval by Congress of the decision of this Court, although no such qualification was expressed in the decision of this Court.

In the *second* place, if the rule adopted by Congress giving the right to deduct the estate tax in the year in which it accrued and became due is restricted to a case where executors include in their return income accrued although not received, this part of the decision of this Court in the *Woodward* case, and the subsequent legislative adoption of such construction by Congress, become practically nugatory.

The Revenue Act of 1918 and the adoption and approval of the decision in the *Woodward* case should be read in the light of the common law (*United States* v. *Sanges,* 144 U. S. 310, 311; *Thompson* v. *Thompson,* 218 U. S. 611, 618, 619).

An executor is a fiduciary whose term of office is limited in time. His duty is to collect and liquidate the assets of the estate, pay debts and distribute the balance. Obviously an executor should not enter up as his income or include in his accounts, items which have

not come into his hands; nor is it his duty to charge himself with such items.

Indeed, in a case in which the financial interests of the beneficiaries would be affected, we do not believe any court would permit him to include in his books or in his accounts to the court income not actually received by him.

In most jurisdictions executors are entitled to commissions upon the income of the estate during the administration. It would be improper to allow an executor commissions on the basis of accounts that include income which had accrued but which he had not received and which might not be received at all or might be received by a successor who would be entitled to commissions.

Nor do we believe that it is permissible for an executor in rendering his return for income tax to include therein income accrued but not received by him with the result of charging the estate in his hands with an obligation for the payment of taxes with respect to income which might never be received or which might be received in some subsequent year by beneficiaries or by the testamentary trustee and perchance at a time when the rate of tax or the method of computation thereof might be utterly different.

If any method were adopted by an executor other than that of charging himself only with the income actually received by him, and of reporting such income for the purpose of income taxation, it would be anomalous and inconsistent with the method habitually and commonly pursued by executors in keeping their ac-

counts, in accounting to the court and in making their tax returns.

The contention that executors should include in their books and accounts income accrued in order to fall within the decision in the *Woodward* case amounts to a request that this Court sanction such an unusual and abnormal method of keeping executors' books; or sanction a method of keeping books different from that by which they must account to the court appointing them or to sanction the keeping of one set of books for income tax purposes and another set for accounting to the court and dealing with the legatees and distributees. Certainly this Court had no such thought in the *Woodward* case.

If the Government's argument be sound, then Congress by enacting the Revenue Act of 1921 approved the decision of this Court in the *Woodward* case permitting the deduction of the estate tax in the year in which it accrued and became due (although not paid until the following year) *only if that decision of this Court be restricted to cases in which executors have the fortitude to charge themselves with income which they have not received and which they may never receive.* The approval by Congress of the decision of this Court in the *Woodward* case and of the regulations promulgated pursuant thereto should not be limited by any such narrow or forced construction. *Likewise* neither should the Revenue Act nor the decision of this Court in the *Woodward* case be so restricted. This Court has repeatedly held that a statute will be construed, in its application to a particular case, so as not to lead to

injustice or absurd consequences. (*United States* v. *Kirby,* 7 Wallace 482; *Holy Trinity Church* v. *United States,* 143 U. S. 457.)

In contending that the unqualified decision in the *Woodward* case should be qualified in its application, the Government makes substantially the argument (*a*) that in the briefs in the *Woodward* case, no mention was made of section 212 (b) of the Revenue Act of 1918 which prescribed that the income should be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer (p. 16); (*b*) that in the *Woodward* case "proper attention was not given to the question of the year in which the deduction should be taken" (p. 17); (*c*) that, in substance, the right to deduct the estate tax in the year in which it accrued and became due and payable depended upon the method in which the executors kept their accounts (p. 17); (*d*) that if the executors in the *Woodward* case kept their accounts and made their returns on a so-called "receipts and disbursements basis" they were not entitled to the deduction of the Federal estate tax in the year 1918 (p. 18) and, therefore, (*e*) that the decision in the *Woodward* case was erroneous as the executors in that case (as the Government itself states at page 15) "filed a return of income 'received'."

Thus the Government contends *that if certain arguments had been made before this Court in the Woodward* case which the Government states were not made, this Court would not in that case have rendered the decision that it did render. For the decision of this Court in that case was flatly to the effect that execu-

tors in computing their income tax upon income received by them during a calendar year might deduct the estate tax which accrued and became due and payable in that year although it was not paid until the following year.

A similar contention was made and overruled by this Court in the analogous case of *Latimer* v. *United States,* 223 U. S. 501. There the plaintiff imported into Porto Rico tobacco consisting of sweepings from floors. He contended that the sweepings were "*waste*" and as such dutiable at ten per cent. *ad valorem* under the Tariff Act of 1897. The customs officer classed the sweepings as "*unmanufactured tobacco*" dutiable under the Act at 55 cents per pound. The importer appealed to the General Board who sustained the Collector. The decision of the General Board was affirmed by the District Court of Porto Rico. A direct appeal was then taken to this Court.

It appeared that under the previous tariff act which contained the same language as that in the Tariff Act of 1897, this Court had held that such sweepings were "*unmanufactured tobacco*".

In arguing the case before this Court the importer made the similar contention that is now made here by the Government. He insisted that in the argument of the earlier case before the Supreme Court the contention had not been made that the tobacco was "*waste*", and that if that contention had been made the conclusion of the Court might have been that it was "*waste*".

This Court, however, affirmed the decision of the lower court and held that the previous case had decided that the words in the statute "*unmanufactured tobacco*"

included tobacco of the sort involved and that by re-enacting the same words in the later act Congress had adopted the construction already given to them by the previous decision of this Court. At page 504 this Court (Mr. *Justice Lamar*) said:

> "The plaintiff claims that this decision has no application here, because it related to clippings which were of a higher grade than scrap, and for the further reason that, *as the importer there made no claim that it should be taxed as waste, the Court did not pass on that question.* But it did definitely decide that such material, by whatever name called, was 'unmanufactured tobacco'. The words, having received such a construction under the act of 1883, must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute, *Congress adopted the construction already given it by this Court.*" (Italics ours.)

Likewise here, the Government now insists that it made no such contention in the *Woodward* case as it now makes and that the right to deduct the estate tax in the manner permitted in the *Woodward* case should in some way be limited or restricted. But this Court did definitely decide that the estate tax was deductible under the identical circumstances presented by the instant case and expressed no such qualification of the rule announced as that now insisted upon by the Government. Therefore, the Revenue Act of 1918 having been re-enacted by the Revenue Act of 1921 after the construction placed upon the earlier act by the decision of this Court in the *Woodward* case, it follows that

Congress adopted and approved the construction given to the Revenue Act of 1918 by this Court.

In fact the Government's brief in the *Woodward* case did raise the point that the tax should not be deducted from the income for 1918, and this contention was the last main point of the Government's brief. It is true that the Government made this contention in the form that the tax neither accrued nor was paid in the year 1918; but the careful consideration given to this point necessarily involved consideration of whether this accrued tax could be deducted in the year 1918 although paid in the subsequent year.

The contention of the Solicitor General in the *Woodward* case was answered by the unqualified decision of this Court in referring to the estate tax as follows at page 635:

> "*It becomes due not at the time of the decedent's death, as suggested by counsel for the Government, but one year thereafter, as the statute plainly provides.* * * *
>
> "Here the estate tax not only '*accrued,*' which means became due, during the taxable year of 1918, but it was paid before the income for that year was returned or required to be returned. When the return was made the executors claimed a deduction by reason of that tax. We hold that under the terms of the Act of 1918 the deduction should have been allowed." (Italics ours.)

III.

THE EXECUTORS HAD THE RIGHT TO DEDUCT THE ESTATE TAX FOR THE YEAR 1919 IN WHICH IT ACCRUED.

Although the *Woodward* case determined that the estate tax was deductible in the year in which it accrued the Government now contends that that was not permissible unless executors charge themselves with "accrued" income not received by them.

The following extracts from the *Revenue Act* of 1918 are the material portions here involved:

Section 214(a) (3):

> "(a) That in computing net income there shall be allowed as deductions: * * *
>
> "(3) Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war profits, and excess-profits taxes; * * * (c) by the authority of any State or Territory, or any county, school district, municipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed * * *."

Section 200:

> "* * * The term 'paid,' for the purposes of the deductions and credits under this title, means 'paid or accrued' or 'paid or incurred,' and the terms 'paid or incurred' and 'paid or ac-

crued' shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212."

Section 212:

"(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *"

(1) The intention of Congress to permit the deduction in the year in which the estate tax accrued is shown by the changes made by the Revenue Act of 1918 in corresponding provisions of the prior Revenue Acts of 1913 and 1916.

The *Revenue Acts* of 1913 and 1916 provided that, in computing net income, deductions should be allowed (italics ours) of "taxes *paid*"; of "the necessary expenses actually *paid* in carrying on any business" and "of interest *paid* within the year" (*Revenue Act* 1913, *Section* A; *Revenue Act* 1916, *Section* 5).

The *Revenue Act* of 1918 made an important alteration. *Section* 214 of that Act provided for the deduction (italics ours) of "taxes paid or *accrued"*, of business expenses "paid or *incurred,"* and of interest "paid or *accrued"* within the taxable year.

While a so-called "accrual" basis of reporting income was permitted by *Section* 13 (d) of the *Revenue Act* of 1916 under certain circumstances (*United States* v. *Anderson,* 46 Sup. Ct. Rep. 131), that fact does not eliminate the significance of the addition by the *Revenue Act* of 1918 of the word *"accrued"* in referring to deductions. Although in the *Revenue Act* of 1918 Congress added the word "accrued" in referring to the deductions, the word "accrued" was not added on the other side of the account in *Section* 213 defining gross income nor in the provisions of *Section* 219 defining the income of an estate or trust.

The argument of the Government that the right to deduct the estate tax in the year in which it accrued is so limited by *Sections* 200 and 212 that thereunder a strict so-called "accrual" basis was provided, we shall answer under the following subdivisions of this Point.

(2) The right conferred by Section 214(a) (3) to deduct the estate tax in the year in which it "accrued" is not limited by Sections 200 and 212. The result of such a construction would be to render superfluous the definition given in Section 200 of the word "paid" for the purposes of the deductions therein referred to.

The pertinent provisions of *Section* 200 are as follows:

> "* * * The term 'paid,' for the purposes of the deductions and credits under this title,

> means 'paid or accrued' or 'paid or incurred,' and the terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212."

The Government contends that the allowance by *Section* 214(a) (3) of the right to deduct taxes "accrued within the taxable year" is limited by the provisions of *Section* 200 providing that the terms "*paid or accrued*" shall be "construed according to the method of accounting upon the basis of which the net income is computed under *Section* 212", and that thereunder the executors were prohibited from deducting the estate tax accrued from income received by them.

If it had been the object of Congress that *Section* 200 should, in any way limit the right to deduct the estate tax in the year in which it "accrues" (as permitted by *Section* 214), in no event was it necessary to include in *Section* 200 the words:

> "The term 'paid,' for the purposes of the deductions and credits under this title, means 'paid or accrued' or 'paid or incurred.' "

If the portion of *Section* 200 in question had consisted only of the words

> "the terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under Section 212"

and the earlier portion above quoted referring to the definition therein of the word "paid" had been elim-

inated, then the right granted by *Section* 214(a) (3) to deduct taxes either "*paid* or *accrued* within the taxable year" would have been limited (by the remaining requirement that the words "paid or accrued" shall be construed "according to the method of accounting upon the basis of which the net income is computed under *Section* 212") to the same extent as the Government claims the right was limited by the actual form of the provision without omitting the earlier portion thereof.

If *Section* 200, *standing as it is,* be so construed, then the inclusion of the first portion of *Section* 200, wherein the word "*paid*" is defined, is rendered superfluous and unnecessary, for the term "*paid*" *is not used by itself* in *Title* II (the title referred to) *for the purposes of any deduction thereunder.* Whenever the word "paid" is used in any section of the Act relating to allowable deductions, it is used together with the word "accrued", in the form "paid or accrued", and, accordingly, if the contention of the Government be correct the latter portion of *Section* 200 would afford a sufficient definition both of "*paid*" and "accrued" and the earlier portion of *Section* 200 is superfluous.

Of course it is a settled rule of statutory construction, to which this Court has frequently referred, that a statute shall not be construed so as to render superfluous any portion thereof.

In *Market Company* v. *Hoffman,* 11 Otto (101 U. S.) 112, at pages 115, 116, this Court said:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be

accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Again, in *Platt* v. *Union Pacific Railroad Co.,* 9 Otto (99 U. S.) 48, at pages 58, 59, this Court said:

> "Congress is not to be presumed to have used words for no purpose. * * * the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In *Commonwealth* v. *Alger* (7 Cush. (Mass.) 53-89), it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if practicable, as to give some effect to every part of it."

United States v. *Stowell,* 133 U. S. 1, at *page* 13.

We submit that *Section* 200 should be given another construction, which will give effect and afford a reasonable meaning to its provisions and not render unnecessary any of its provisions. The first portion of *Section* 200, providing that the term *"paid"* means *"paid or accrued"* or *"paid or incurred",* is not rendered superfluous or unnecessary if the *entire section* be construed as *being solely* a definition of the word *"paid"* (namely, as "paid or accrued" or "paid or

incurred") and if the subsequent provision of the section be construed as limiting the words "paid or accrued" or "paid or incurred" *only when those words are used* in *Section* 200 (in so defining the word "paid") and *not when used* in *Section* 214(a) (3) in providing for the deduction of taxes "paid or accrued".

In this connection we refer to the significant change made by the *Revenue Act* of 1924. Congress eliminated from *Section* 200, subdivision (d), of that Act the words:

> "The term 'paid' for the purposes of the deductions and credits under this title, means 'paid or accrued' or 'paid or incurred' ",

confining the section to a definition of the terms "paid or accrued" and "paid or incurred" when used together.

We submit that the object of this change made by the *Revenue Act* of 1924 was to render the right to deduct taxes accrued dependent upon the provisions of *Section* 212 and that it was not dependent thereon under the prior acts of 1918 and 1921.

This Court said in the case of *Provost* v. *United* States, 46 Sup. Ct. Rep. 152, 155, in dealing with an analogous situation:

> "* * * and when Congress adopted in the amended law of 1921 *the very suggestion made and rejected two years before, it then intended to effect a change in the law as it had previously existed* (*Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391." (Italics ours.)

That the right to deduct the estate tax in the year in which accrued was not limited by the provisions of Sections 200 and 212 is shown by the history of the Revenue Act of 1918 during its passage through Congress.

As first passed by the House of Representatives the bill (H. R. 12863, 65*th Congress,* 2d *Session; see Senate Report No.* 617) permitted the deduction from income received (*Sec.* 213) of taxes either *"paid"* or *"accrued"* in substantially the form in which the law was finally passed. In its original form the bill did not contain in *Section* 200 any of the definitions of the word *"paid"* or of the phrase *"paid or accrued"* or of the phrase *"paid or incurred"* finally set forth in *Section* 200 and left the right to deduct taxes either "paid" or "accrued" without any qualification.

The Senate disagreed and attempted to insert in *Section* 200 of the bill the following provision, which was utterly different in effect from *Section* 200 as it was finally passed and which was the same as the corresponding provision in the Revenue Act of 1924 reading: "The terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under *Section* 212" (Cong. Rec., Vol. 57, p. 293). In the Senate's attempted revision of the bill the word *"paid"* was not defined, but it was provided that the words *"paid or accrued"* should be construed according to the method of accounting upon the basis whereof the net income is computed. The result of reading the Senate's suggested limitation

into *Section* 214(a) (3) indicates the difference between the Senate revision and the law as it was finally passed. The Senate revision might have been construed as making *Section* 214(a) (3) provide that in computing net income there should be allowed as deductions "taxes paid or accrued according to the method of accounting upon the basis of which the net income is computed under Section 212."

If the bill had been passed in this form, the contention of the Government that *Section* 214(a) (3) was limited by *Section* 200 might have been sustained.

However, the proposed Senate revision was *rejected* by the House (*Congressional Record, Vol.* 57, *pp.* 944, 945). Having been so rejected the question was considered by the Conference Committee of the two Houses. The Conference Committee did not accept the Senate Revision, but modified the provision into the form in which it was finally enacted into law, by adding the words:

> "The term 'paid,' for the purposes of the deductions and credits under this title, means 'paid or accrued' or 'paid or incurred' * * *."

Thereby the original intention of the House of Representatives was restored.

This change made by the Conference Committee is well set forth in the statement regarding the results reached by the Conference Committee made by the Managers on the part of the House (*Congressional Record, Vol.* 57, *p.* 2986):

> "Amendment No. 13: This amendment provides that the terms 'paid or incurred' and 'paid

or accrued' when used in the income tax title shall be construed according to the method of accounting upon the basis of which the net income is computed under Section 212; *and the House recedes with an amendment defining the word 'paid' when used for the purpose of computing the deductions and credits.*" (Italics ours.)

The result was that, in the bill as finally enacted, *Section* 214(a) (3) provided for the deduction of taxes "accrued" from income received without any limitation imposed by the definitions set forth in *Section* 200 and *Section* 212.

In this connection we refer to the rule declared in *Gould* v. *Gould*, 245 U. S. 151 (Mr. *Justice McReynolds*) at page 153 as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. *United States* v. *Wigglesworth*, 2 Story 369; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Benzinger* v. *United States*, 192 U. S. 38, 55."

The following provision was also included in Section 213(a) of the Revenue Act of 1918, referring to items of gross income (not to deduction):

> "The amount of all such items shall be included in the gross income for the taxable year

> in which *received* by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of Section 212 any such amounts are to be properly accounted for as of a different period; * * *."

We submit that this provision requiring as the primary method of reporting *receipts* as the *gross income* of the taxpayer contemplated that there might be deducted therefrom not only taxes "*paid,*" but also (as for the first time permitted by the words of the Revenue Act of 1918) taxes "*accrued*". The fact that some other method of reporting income might under some circumstances be allowed does not alter the force of the primary method established or the right to the deductions allowed.

The *estate of a decedent* furnishes a striking illustration of the applicability of our contention that Congress intended to permit the deduction of the estate tax in the year in which it accrued from gross income received. Frequently and perhaps usually estates are in process of administration for not more than one full year, as in the *Woodward* case. Distribution of the estate is required as soon as possible. From the first and usually the only one full year the estate tax, the largest single deduction, should be allowed. Although the estate tax becomes due at the end of one year from the date of decedent's death, frequently it cannot be paid until thereafter without sacrifice of assets.

In the instant case the estate tax amounted to nearly three million dollars. The income tax for 1919 without deduction for estate tax amounted to about nine hundred thousand dollars. An excellent illustra-

tion is thus afforded of the fact that the year following the decedent's death is the year involving the greatest complexities of administration and is the year in which the greatest burdens are imposed upon the estate and upon the executors in procuring funds to make such large payments.

We submit, therefore, that Congress intended by the addition of the word "accrued" in the Revenue Act of 1918 to permit executors to lighten these burdens by deducting from the first and usually the only full year of administration the amount of the estate tax during the year in which it became due. *Certainly the deduction should not be disallowed merely because the executors did not choose to run the risk of charging themselves with and paying income tax upon income not received by them.*

The *Revenue Act* of 1918 should be construed to contemplate a reasonable result in its application to the instant case. If the contention of the Government be sustained, an executor was not permitted to deduct the estate tax in the year in which it accrued if not paid in that year unless the executor was willing to run the risk of personal liability by charging himself with income not received.

As executors should not and would not normally be willing to assume such a risk, the practical consequence would be to deny to estates the option afforded by *Section* 214 to deduct the estate tax from the income in the year in which it accrued, unless paid in that year. Thus beneficiaries represented by fiduciaries, such as executors, would be the only persons who would not be able to

avail themselves of the option. But it was held in the *Woodward* case that the estate tax could be deducted from income "received" by the executors in the year in which the estate tax accrued, although not paid in that year, and in the subsequent regulation of the Treasury Department promulgated pursuant to the *Woodward* case the same right of executors was declared to exist.

The conclusion is that a reasonable construction of the law does not restrict the executors from deducting the estate tax in the year in which it accrued, though not paid in that year, to cases in which the executors are willing to charge themselves with income which they have not received.

The Government's argument if sustained would throw the *greatest burden upon the very estates which had already suffered* from the earlier erroneous ruling of the Commissioner to the effect that the estate tax was not deductible in any year.

Those estates, including the Gates estate, were compelled to pay their taxes without the benefit of any deduction whatever until after the question had been decided by this Court. Now, after the decision in the *Woodward* case and after Congress has expressly approved the holding therein by enacting the Revenue Act of 1921, the Government is endeavoring to deprive these taxpayers of the full benefit of the deduction by compelling them to take it in a later year.

Future taxpayers can divide, in fact are dividing, their estate tax payments over a series of years. Thus they are taking advantage of the position now insisted upon by the Commissioner, which the Government in-

sists upon in the instant case. A like method of dividing the payments can be pursued under the provisions of the Revenue Act of 1924. The present ruling of the Commissioner harms only those taxpayers already injured by reliance upon his previous erroneous ruling under which they were denied the benefit of a deduction in any year.

(3) The law justified no such sharp line as that insisted upon by the Government between a so-called "cash receipts and disbursements basis" and a so-called "accrual basis".

The Government asserts in its brief (pp. 9, 12) that the executors' return should have been rendered either upon a so-called "cash receipts and disbursements basis" or upon a so-called "accrual basis". This contention is based only upon an assumption, made without argument, that the right given by *Section* 214 to deduct the estate tax in the year in which it accrued was restricted by *Sections* 200 and 212 and that *Sections* 200 and 212 drew a sharp line of distinction between the two bases of accounting to which the Government refers.

We have contended, *supra,* that *Sections* 200 and 212 do not so limit *Section* 214. Admitting, only for argument, that the right to deduct the estate tax in the year in which it accrued should be read in connection with *Sections* 200 and 212, we contend that those sections do not make the right of the executors to the deduction dependent (as the Government contends) upon their charging themselves with income not received by them.

The *ultimate requirement* of *Sections* 200 and 21
is that the taxpayer shall render his return so as t
"clearly reflect income". Thus, *Article* 22 of *Regula-
tions* 45 under the *Revenue Act* of 1918 provided:

> "The time as of which any item of gross in
> come or any deduction is to be accounted fo
> must be determined in the light of the funda
> mental rule that the computation shall be mad
> in such a manner as clearly reflects the tax
> payer's income."

Those sections required that if the taxpayer kept book
which did not clearly reflect income, he must neverthe
less make his return so that income would be clearl
reflected. If he kept no books the requirement was th
same. The criterion in any case was whether incom
was clearly reflected by the return.

The Government states in its brief (p. 11) that i
the taxpayer's books do not clearly reflect income or i
he keeps no books, the basis for the return and the com
putation of the tax was one to be designated by th
Commissioner. In the instant case the executors mad
their return of income at a time when the regulation
and rulings of the Commissioner *forbade any deductio
for the estate tax in any year* and therefore the execu
tors rendered a return, under protest, of the gross in
come actually received by them without making an
deduction for the estate tax which had accrued an
become payable. The Commissioner was certainly no
given authority to contravene by his rulings the ex
press terms of the law or the intent thereof as inter
preted by this Court. If, as we contend and as was hel

in the *Woodward* case, the law intended to provide that from income received by an executor the estate tax might be deducted in the year in which it accrued though not paid until the following year, the Commissioner had no authority to determine otherwise.

That no such sharp line of distinction between a so-called "cash receipts and disbursements basis" and a so-called "accrual basis" (to which the Government refers) was intended by the Act appears from the statute itself and from rulings of the Commissioner.

For instance, it is provided in *Section* 219 that from "*income received* by estates of deceased persons" executors may deduct

> "any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year *paid to or permanently set aside* for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, * * *" (Sec. 219 [b]. [Italics ours.]

This provides for the deduction of an accrued item from income "*received*". Nothing is gained by calling the deduction a "*constructive payment*". Deductions, therefore, are not restricted to disbursements actually made.

Again, *Section* 219 (b) in making further provision concerning estates and trusts, and still referring primarily to "income received", provides:

> "in cases under paragraph (4) of subdivision (a) of this Section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, *whether or not* distributed before the close of the taxable year for which the return is made." [Italics ours.]

Thus, again the law permits the deduction from income "received" of an accrued deduction, whether or not distributed.

Again, *Section* 219, still referring to "income received", provides further in subdivision (c) that

> "in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly *paid or credited* to any legatee, heir or other beneficiary. * * *" [Italics ours.]

This provision furnishes an additional illustration of an accrued deduction from income "received", whether payment is made or not.

By parity of reasoning, it is provided in *subdivision* (d) of *Section* 219, still referring to "income received", that

> "there shall be included in computing the net income of each beneficiary his distribution share, *whether distributed or not,* of the net income of the estate or trust for the taxable year, * * *". [Italics ours.]

Thus, in a return of income "received", a beneficiary entitled to a distribution must pay an income tax thereon, although he has not received the distribution.

Among other regulations, the Commissioner issued the following regulation under the Revenue Act of 1918:

> "The regulations governing partnerships are generally applicable to such an estate or trust * * *" (Article 345, Regulations 45).
>
> "The distributive share of the profits of a partner in a partnership or of a stockholder in a personal service corporation is regarded as *received by him although not distributed* * * *" (Article 54, Regulations 45).

Terming such an accrual a "constructive receipt" is a mere fiction. Certain items of accrual should be included with receipts in order to clearly reflect income.

Another striking example of an "accrual" which is treated as a "receipt" is found in the following regulation (Article 54, Regulations 45):

> "*Examples of Constructive Receipt.*—Where interest coupons have matured, but have not been cashed, such interest payment, *though not collected when due and payable,* is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. * * *" [Italics ours.]

The reason for this regulation is that such coupons are a part of the true income of a taxpayer who renders a return of the income received.

Again in another way *Section* 219 of the Act shows that it was not the intention of Congress that executors, in keeping their books or in rendering their returns,

should charge themselves with any income not received by them, except perhaps in such a case as that of an overdue coupon which it was the duty of the executors to collect. That section provides that the income tax shall be imposed upon:

> "Income *received* by estates of deceased persons *during the period of administration or settlement*". (Italics ours.)

Congress did not intend that executors should be taxable upon income not received by them during, but received by someone else after the end of, "the period of administration or settlement". It could not have been the intention to require that executors should charge themselves with income received by someone else after the close of the administration as a condition of their right to deduct the estate tax in the year in which it accrued.

The Government argues that because the taxpayer did not *accrue income*, it should not be permitted to *accrue taxes*.

This contention illustrates the *widely varying senses* in which the word "*accrue*" is used. When the Government speaks of accruals of income in this case it refers to such an item as interest accrued December 31st on a semi-annual coupon due in the following year, namely, income which has not become due and payable and which may never be received. The analogous case, on the other side of the account, is the accrual of part of an annual real estate tax which becomes due in the following year. Accruals of taxes in this sense are fre-

quently set up on their books by commercial corporations and are allowed by the Bureau.

The Federal estate tax, after it accrues and becomes due and payable, *is utterly different in nature.* It "accrues" in an entirely different sense of the word, namely, of "having come or fallen in". Analogous to the estate tax, on the other side of the account, is an interest coupon which has become due but which remains uncollected through neglect or design but which the Bureau requires to be included in returns on whatever basis made (*Article* 54, *Regulations* 45).

To distinguish between such an item as an overdue coupon and a past due tax unpaid by calling one a "*constructive receipt*" and the other an "*accrual*", and then to argue that the "constructive receipt" has a proper place in a return on an actual cash basis while the unpaid estate tax has not, cannot disguise the fundamental difference.

The case of *United States* v. *Anderson,* 46 Sup. Ct. Rep. 131, arose under the *Revenue Act* of 1916 as amended by the *Revenue Act* of 1917, before the numerous significant changes made by the *Revenue Act* of 1918 under which the *Woodward* case and the instant case have arisen. It involved the case of a corporate taxpayer which had elected to make a return reflecting its books of account and reporting as gross income all items accrued on its books and had claimed as deductions all reserves on its books except the reserve for taxes which did not differ essentially from the others. This Court held that a taxpayer electing to make a return in accordance with its books under the Act of

1916 must abide thereby in a case in which income was properly reflected by the books. Although this Court said that the question considered in that case *"was not raised, considered or decided" in the Woodward case* (p. 134), yet the case is particularly interesting here because of its reference to the difficulty encountered under the acts of 1909 and 1913 under which only interest, taxes and the like actually *paid out* were recognized as deductions. In that case this Court also referred to the fact that it was pressed upon the Court in argument that even under the strict terms of the Acts of 1909 and 1913 it was necessary at least to some extent to establish by administrative practice the use of inventories and "the deduction of expenses constituting a liability of the taxpayer—paid or not—in ascertaining net income" and to the change made by the Act of 1918 (which we regard as salutary and significant) permitting the deduction of taxes either "paid *or accrued* within the taxable year" in order to clearly reflect income.

The necessity of avoiding the harsh or illogical computations which would result from too strict a rule, particularly under the broader provisions of the Act of 1918, was recognized in the *Woodward* case.

The important thing is that the return should clearly reflect income, as nearly as might be, under the difficulty of applying a tax law to a multitude of taxpayers and under a multitude of different circumstances. In order to achieve a just and proper result so far as is possible, it is not proper to enforce a sharp rule that so-called "accrued" deductions (in several different senses of the word "accrued") have some

relation to so-called "accrued" income (in several different senses of the word "accrued") and that therefore so-called "accrued" deductions have no relation to "income received". There is no such linking of "accrued income" and "accrued deductions" in the 1918 Act as the Government insists upon, nor is there any use of the term "cash disbursements" or any such linking of that term with the term "income received" as the Government insists.

The Government refers in its brief (p. 13) to *Article* 23 of *Regulations* 45 providing:

> "A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency."

The Act of 1918 contained no such provision. But the regulation itself does not require absolute, but only "reasonable" consistency. For the reasons above stated we submit that the contention of the executors is consistent.

The Government also refers (p. 13) to a quotation from page 497 of *Montgomery, Income Tax Procedure,* 1925 Ed., reading:

> "Shortly stated, taxpayers must keep their accounts on a uniform basis—cash or accrual. They must avoid a 'mixed' system."

The author makes this statement in reference to the law of 1924 and quotes *Section* 200 (d) of that law which amplified and changed the form of *Section* 200 of the Act of 1918. The only authority cited by the author

is a ruling of the Board of Tax Appeals which does not sustain the conclusion.

Mutual Benefit Life Ins. Co. v. *Herold*, 198 Fed. 199 (D. C., D. N. J. 1912) decided under the Corporation Tax Law of 1909, and *United States* v. *Christine Oil & Gas Co.*, 269 Fed. 458 (D. C., W. D. La. 1920) decided under the Revenue Act of 1913, which are cited in the brief for the Government (p. 13) hold that under those acts only income actually received was required to be reported and that the Government could not extend the acts to cover as taxable income items which had become due but had not been received. The court in reaching this conclusion in each case, referred to the fact that the section providing for deductions permitted the deduction only of items of expenses, interest and the like, actually paid out, and, therefore, held that it would be unjust to the taxpayer to tax him on income not received. The *Mutual Benefit Life Ins. Co.* case, on which the other case relied as an authority, in reaching this conclusion referred at considerable length to numerous cases holding that taxing acts should be construed in favor of the taxpayer. It is undoubtedly true that apart from this reasoning under the words of the act of 1909, and the act of 1913, taxable income was limited to income received; and we see no reason to object to the court giving this additional reason, except to mention that neither of the cases is a very strong case. The former case was affirmed in *Herold* v. *Mutual Benefit Life Ins. Co.*, 201 Fed. 918, in a brief *per curiam* opinion, the court disapproving of some of the statements made in the lower court, and the holding

in *United States* v. *Christine Oil & Gas Co.* case to the effect that unpaid installments of an installment contract are not income until received has been disputed by the Department of Internal Revenue to this very date, the Department still insisting that such unpaid installments are taxable as income received.

Maryland Casualty Co. v. *United States,* 52 Ct. Clms. 201, cited in the Government's brief (p. 13) was considerably modified in some respects on appeal in 251 U. S. 342. But the Court of Claims and this Court pointed out that the Revenue Act of 1913 expressly limited gross income to that "*received* within the year from all sources" and thereby rendered unnecessary the reasoning referred to in the two cases just referred to, the *Mutual Benefit Life Ins. Co.* case and the *Christine Oil & Gas Co.* case. This Court agreed with the Court of Claims in holding that premiums received by the Casualty Company's agents were received by the company when the money came into the hands of the agents, although not yet transmitted to the home office, and that the Casualty Company must account for this money as "received". The Court of Claims pointed out that the company's books could not be used as a basis; since they reflected only the moneys that had been sent in to the home office and not those in the hands of the agents, and, therefore, did not clearly reflect the net income received. The Casualty Company was attempting to report income received but was leaving out part of the money received.

The Government makes the further statement at page 13 of its brief that the "necessity for consistent

treatment of all items on either one basis or the other was further developed in *United States* v. *Anderson, supra.*" Although that case was decided under a prior act, we do not believe that this Court intended in that case to lay down the sharp line insisted upon by the Government in this case.

We submit that the clear reflection of income in the case of estates calls for the deduction of taxes which are due and payable, even if unpaid, and that it does not call for the inclusion of income which has accrued and which may never be received by the executor.

IV

THE TEXAS INHERITANCE TAX SHOULD BE PERMITTED AS A DEDUCTION.

The brief for the Government (page 22) concedes that the inheritance tax of $357,739.34 imposed on the estate of Mrs. Gates by the laws of the State of Texas is properly deductible in the year 1919 if deductible from the income of the estate at all. It both accrued and was paid in the year 1919, the year for which it is claimed as a deduction by the executors.

As the Government agrees in its brief (page 8), if "the deduction of the Federal estate tax is disallowed, but the Texas inheritance is held to be deductible, the amount of income tax for 1919 paid by the executors will be found to be too large by the amount of $261,149.72 (R. 46; Finding XVII); and in that event the judgment of the Court of Claims should be reversed with directions to grant judgment to the executors for the amount last stated, less any offsets existing in favor of the United States." On this matter of computation, the appellees have only two things to add: (1) Interest should be allowed from the respective dates of payment of the tax, namely: on one-fourth of the said amount of $261,149.72 from March 15, 1920; on one-fourth from June 15, 1920; on one-fourth from September 15, 1920; and on the remaining one-fourth from December 15, 1920, as was allowed by the Court of Claims on the amount it held should be refunded (R. 43, 44) as to dates of payment. (2) There are no offsets existing in favor of the United States which

apply against this deduction. The offset of $381,931.57 which applied against a recovery under the appellees' first claim, namely: of a deduction for Federal estate tax, and which was allowed by the Court of Claims, was for unpaid income tax for 1920, and is not due to the Government if the Government is successful in its contention that the estate tax should be deducted for the year 1920, and therefore is not an offset against a recovery on account of the Texas inheritance tax. The findings show (R. 44, 45) that if the Government's contention as to the year in which the Federal estate tax is sustained, no income tax whatever is payable with respect to the year 1920. Therefore, there is no offset against the aforesaid sum of $261,149.72 and interest.

As the Government states in its brief (at p. 19) *Keith* v. *Johnson,* in this Court, No. 295, October Term, 1925, argued January 6, 1926, and not yet decided, involved the question whether the New York inheritance tax is deductible by the executors. The right to such a deduction of the New York inheritance tax has been upheld in a number of cases.

> *United States* v. *Perkins,* 163 U. S. 625.
> *Keith* v. *Johnson,* 3 Fed. (2d) 361.
> *Farmers Loan & Trust Co.* v. *United States,* United States District Court, Southern District of New York, November 30, 1925.
> *Matter of Tilford,* United States Board of Tax Appeals, February, 1926.

See

> *Matter of Law,* 204 App. Div. (N. Y.) 590; affirmed 236 N. Y. 607.

The brief of the Government concedes (p. 19) that *"the Texas statute and the New York statute are not unlike."* The inheritance tax law of the State of Texas, which imposed the tax in question upon the estate of Mrs. Gates, was the same in every material respect as the inheritance tax law of New York. This is shown by the following comparative analysis of the material provisions of the law of New York and the law of Texas:

Tax Imposed Upon All Property Passing to Legatees, Devisees or Descendants

Texas	New York
Article 7487, Vernon's Sayles' Texas Civil Statutes, Ed. 1914, as amended by laws of Texas, 1917, Chap. 166.	*Section 220 of Article 10 of the Tax Law (Chap. 62, Laws of 1909, as amended, provides*:
"All property within the jurisdiction of this state * * * which shall pass absolutely or in trust by will or by the laws of descent * * * shall upon passing to or for the use of any person" (with certain stated exceptions) "* * * be subject to a tax for the benefit of the state as follows:"	"A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases * * *" (The section then provides for taxation of transfers "by will or intestate law * * *.")

The Amount of the Tax Dependent Upon the Relationship of the Recipients to the Decedent

Article 7487, Texas Statutes

If passing to father, mother, husband, wife or lineal descendant—no tax; if passing to a lineal descendant, brother, sister or lineal descendant of brother or sister —the lowest rate; if passing to an uncle, aunt or lineal descendant of an uncle or aunt—an intermediate rate, and if passing to any other person—the highest rate.

Section 221-a of Article 10 of the Tax Law (Chap. 62, Laws 1909 as amended).

If transfer to father, mother, husband, wife, child, or adopted child—the lowest rate; if transfer to brother, sister, wife and others—an intermediate rate, and if transfer to any other person —the highest rate.

Tax a Lien Upon the Property Passing

Article 7493, Texas Statutes, provides:

"* * * Said tax shall be a lien upon such property from the death of the decedent until paid, and shall bear interest from such death until paid, unless payment shall be made within six months after such death, in which case no interest shall be charged."

Section 224 of Article 10 of the Tax Law of New York (Chap. 62, Laws 1909 as amended) provides:

"Every such tax shall be and remain a lien upon the property transferred until paid * * *."

Executor Required to Pay Tax Both in Texas and in New York

Article 7494, Texas Statutes provides:

"If such property be in the form of money, the executor * * * shall deduct the amount of the tax therefrom before paying it to the party entitled thereto; if it be not in the form of money he shall withhold the property until the payment by such party of the amount of tax; in any case the executor * * * shall be liable for the amount of the tax and shall have the right, in case of neglect or refusal after due notice of the party entitled to the property to pay such amount, to sell, at public sale, after due notice to such party, the property, or so much of it thereof as may be necessary. Out of the sum realized on such sale, the executor * * * shall deduct the amount of the tax and the expenses of the sale and shall pay the balance to the party entitled thereto."

Section 224 of Article 10 of the Tax Law of New York (Chap. 62, Laws 1909 as amended) provides that

"the executors * * * of every estate so transferred shall be personally liable for such tax until its payment. Every executor * * * shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator * * *. Any such executor * * * having in charge or interest any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the State Comptroller or County Treasurer as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this Article to any person until he shall have collected the tax thereon * * *."

Even the minor provision referred to in the Government's brief as to possible refunds, namely: Article 7500 of the Texas act has a corresponding provision in the New York act (Chapter 62, Laws of 1909, Section 225, as amended) in the following form:

> "If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the tax commission, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid; or if such tax has been paid, the tax commission with the approval of the comptroller shall refund out of the funds in the custody of the comptroller to the credit of such taxes such equitable proportion of the tax."

The Texas inheritance tax law, in the form in which it was at the time of the death of Mrs. Gates is set out in full as *Appendix A* of this brief, including for the sake of completeness several sections omitted from *Appendix B* of the brief for the Government. As stated above there are some differences in language from the New York statute involved in *Keith* v. *Johnson, supra,* but no difference of substance, so far as the deductibility of the tax under the income tax law is concerned.

The brief of the Government (p. 21) refers to the

rulings of the Treasury Department as consistently holding that state inheritance taxes "imposed on the right to receive and computed on each separate share, are deductible by the heir or legatees and not by the estate"; and that the Texas tax has been classified as such a tax. It might have been added, as is the fact, that the New York tax has always been classified by the Treasury in exactly the same category as the Texas tax (*Cum. Bal.* II-1, p. 87), the treatment of these two taxes and of other State inheritance taxes as a group having varied from time to time as we shall show.

The Government's entire statement above quoted is unwarranted praise of the Treasury Department in this respect, and entirely unjustified by the history of the subject. Probably on no point have the regulations of the Bureau of Internal Revenue been so wholly in error or so inconsistent with each other or with the decisions of the Courts.

From 1913 to 1921 the regulations flatly forbade any deduction whatever for State inheritance taxes or Federal estate tax. (R. 45; *Regulations* 45, *Article* 134, until amended in April, 1922). During this period the Government successfully opposed a legatee who sought to deduct the New York inheritance in *Prentiss* v. *Eisner*, 267 Fed. 16 (C. C. A., 2nd Circuit, 1920); *certiorari* refused 254 U. S. 647; the court holding that the legatee could not deduct the tax because it was not paid by him and was taken out before the property became his. This decision was based on the prior decision of *United States* v. *Perkins*, 163 U. S. 625, in which the New York tax was held to have been prop-

erly levied on a legacy to the United States, since the tax was not imposed upon the *United States,* the legatee.

Then this court decided in June, 1921, the case of *United States* v. *Woodward,* 256 U. S. 632, *supra,* holding that the Federal estate tax was deductible. For almost a year after that, the Bureau of Internal Revenue made no change in its regulations and continued to forbid all deductions for State inheritance taxes.

In April, 1922, the Bureau recognized that the decision in *United States* v. *Woodward,* applied to these taxes also, and issued the surprising regulation in lengthy form that taxes on the right to *transmit* by bequest were deductible by executors, but that taxes on the right to *receive* were deductible by legatees. Whether this attempted distinction has any meaning and whether it is a test that can be applied in practice we shall not stop to discuss. In any event a later regulation was issued, holding that both the New York tax and the Texas tax were on the right to receive and therefore deductible by the legatees and not by the executors. This was a surprising ruling because directly and necessarily contrary to *Prentiss* v. *Eisner, supra,* and to *United States* v. *Perkins, supra.* There was no consistency with the previous rulings which forbade any deduction at all, or with the law as already laid down in those two important cases, which held that the tax was not imposed on the legatee. The regulation, soon after its promulgation was disregarded by the courts in *Johnson* v. *Keith,* 294 Fed. 964 (District Court, 1923) and by the Circuit Court of Appeals in *Keith* v. *Johnson,* 3 Fed.

(2nd) 361, from which the appeal now pending and argued before this court was taken. It was also disregarded by the New York courts in *Matter of Law*, 204 App. Div. 590, unanimously affirmed, 236 N. Y. 607, and in *Farmers Loan & Trust Co.* v. *United States*, *supra*. So much for the argument as to the consistency and importance of the regulation.

The brief of the Government (page 21) makes the further point that *Keith* v. *Johnson* might have been differently or might be differently decided except for binding decisions by the New York courts.

Both *United States* v. *Perkins, supra,* and *Prentiss* v. *Eisner, supra,* were decided *independently of the New York decisions.*

In *United States* v. *Perkins,* this court in holding that the tax was not levied on the United States or its property (the legacy being a bequest to the United States) said at p. 668 (of 163 U. S.):

> "In this view, the so called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose

of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. This was the view taken of a similar tax by the Court of Appeals of Maryland in State *v.* Dalrymple, 70 Maryland 294, 299 * * *."

The court having reached its conclusion independently of any New York case, then went on to point out (at p. 629 of 163 U. S.) that this nature of the tax had been upheld by the courts of New York and several other States. The court said further at p. 630:

> "We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

In *Prentiss* v. *Eisner,* at p. 20 (of 267 Fed.) Judge Rogers in delivering the opinion of the Circuit Court of Appeals, after quoting from *United States* v. *Perkins, supra,* said:

> "We find no case in the subsequent decisions of the New York Court of Appeals in which that court disclaims the construction placed by the Supreme Court of the United States on the New York decisions, or in any way qualifies or overrules the proposition that the 'tax' under the New York law is not one upon the property, but

is one upon the right to dispose of it by will or by descent. In the absence of such a decision it seems to be our duty to follow the law as it is laid down in the Perkins Case, unless there can be found in the New York statute in force when the present tax was laid some substantial difference from the statute in force when that case was decided in the particular now being considered. If such a difference exists, we have failed to detect it, and learned counsel have failed to point out in what it consists."

He said further at p. 21:

"We admit that the New York cases on the subject of taxable transfers are confused and not always clear and consistent. *But, until the New York Court of Appeals authoritatively states that the law of New York is not what the Supreme Court of the United States said it was in the Perkins case,* this court has no alternative but to hold that the New York Transfer Tax Act does not impose a tax on a legatee's right of succession which is deductible in her income tax return." (Italics ours.)

Therefore, it is clear that the holdings that the legatee is not the person upon whom the tax is imposed, but that it is imposed upon the estate do not depend upon any peculiarity of the New York decisions, but depend upon the fundamental nature of an inheritance tax, as recognized independently of the decisions of the State courts.

There is accordingly no distinction between the right to deduct the Texas inheritance tax and the right to deduct the New York tax in *Keith* v. *Johnson,* now before this court.

Conclusion.

The appellees' first cause of action, based on th
deduction of the Federal estate tax should be sustaine
and the judgment should be affirmed.

If the appellees' first cause of action is not sus
tained, but the second cause of action, based on the de
duction of the Texas inheritance tax, is sustained, th
judgment should be for the sum of $261,149.72, wit
interest on one-fourth thereof from the 15th day o
March, 1920, on one-fourth thereof from the 15th da
of June, 1920, on one-fourth thereof from the 15th da
of September, 1920, and on the remaining one-fourt
from the 15th day of December, 1920.

Respectfully submitted,

A. L. Humes,
Stafford Smith,
Attorneys for the Appellees.

APPENDIX A

TEXAS INHERITANCE TAX LAW

Vernon's Sayles' Texas Civil Statutes [1914 ed.] as amended by Act of 1917, chapter 166)

CHAPTER TEN

Inheritance Tax

Article 7487. *Property subject to the tax.*—All property within the jurisdiction of this state, real or personal, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of this state or not, which shall pass absolutely or in trust by will, or by the laws of descent of this or any other state, or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, shall upon passing to or for the use of any person except the father, mother, husband, wife or direct lineal descendants of the testator, intestate, grantor or donor, or any public corporation or charitable, educational or religious organization within this state when such bequest, gift or devise is to be used for charitable, educational or religious purposes within this state, be subject to a tax for the benefit of the state, as follows:

1. If passing to or for the use of a lineal ascendant or a brother or sister, or a lineal descendant of a brother or sister, the tax shall be two per cent on any value in excess of two thousand dollars, and not ex-

ceeding ten thousand dollars; two and one-half per cent of any value in excess of ten thousand dollars, and not exceeding twenty-five thousand dollars; three per cent on any value in excess of twenty-five thousand dollars, and not exceeding fifty thousand dollars; three and one-half per cent on any value in excess of fifty thousand dollars, and not exceeding one hundred thousand dollars; four per cent on any value in excess of one hundred thousand dollars, and not exceeding five hundred thousand dollars; and five per cent on any value in excess of five hundred thousand dollars.

2. If passing to or for the use of an uncle or aunt, or a lineal descendant of an uncle or aunt of the decedent, the tax shall be three per cent on any value in excess of one thousand dollars, and not exceeding ten thousand dollars; four per cent on any value in excess of ten thousand dollars, and not exceeding twenty-five thousand dollars; five per cent on any value in excess of twenty-five thousand dollars, and not exceeding fifty thousand dollars; six per cent on any value in excess of fifty thousand dollars, and not exceeding one hundred thousand dollars; seven per cent on any value in excess of one hundred thousand dollars, and not exceeding five hundred thousand dollars, and eight per cent on any value in excess of five hundred thousand dollars.

3. If passing to or for the use of any other person, natural or artificial, the tax shall be four per cent of any value in excess of five hundred dollars, and not exceeding ten thousand dollars; five and one-half per cent on any value in excess of ten thousand dollars,

and not exceeding twenty-five thousand dollars; seven per cent on any value in excess of twenty-five thousand dollars, and not exceeding fifty thousand dollars; eight and one-half per cent on any value in excess of fifty thousand dollars, and not exceeding one hundred thousand dollars; ten per cent on any value in excess of one hundred thousand dollars, and not exceeding five hundred thousand dollars, and twelve per cent on any value in excess of five hundred thousand dollars. (Acts 1907, p. 496, Sec. 1.)

ART. 7488. *Property passing in two or more estates.* If the property passing as aforesaid shall be divided into two or more estates, as an estate for years or for life and a remainder, the tax shall be levied on each estate or interest separately according to the value of the same at the death of the decedent. The value of estates for years, estates for life, remainders and annuities shall be determined by the "Actuaries' Combined Experience Tables," at four per cent compound interest.

ART. 7489. *Property bequeathed to executor or trustee in lieu of commission, taxed when.*—If a testator bequeaths or devises to his executor or trustee property in lieu of the latter's commission, the value of such property in excess of reasonable compensation, as determined by the county judge on his own motion, or on the application of any officer on behalf of the state, shall be subject to taxation under this chapter.

ART. 7490. *Inventory to be filed when; penalty.*—Every executor, administrator and trustee of the estate

of a decedent leaving property subject to taxation under this chapter, whether such property passes by will or by the laws of descent or otherwise, shall, within three months after his appointment, make and file an inventory thereof in the county court having jurisdiction of the estate of the decedent. Any executor, administrator or trustee, refusing or neglecting to comply with the provisions of this article, shall be liable to a penalty not exceeding one thousand dollars, to be recovered in an action brought in behalf of the state by the district or county attorney upon notice from the judge of the county court.

ART. 7491. *Appointment of person to sue for and collect tax; compensation; reports; appointment of administrators.*—The Comptroller of Public Accounts of the State of Texas is hereby authorized and empowered, and it is made his duty to appoint and contract with some suitable person or persons whose duty it shall be to look specially after, sue for and collect the taxes provided by this chapter; such person in no event to receive under such contract more than ten (10) per cent of the amount of such taxes collected hereunder, as compensation. It shall be the duty of such person, so contracted with, to make written report to the County Judge of each county in which he may be appointed and employed to assist in the enforcement of this law, of each estate upon which such tax may be due, or may become due, as soon as possible after the death of any person owning such estate. Such report shall state the probably [sic] value of such estate, its character and location, if known, and the names of the persons known to be interested therein.

The amount of compensation due such person shall be paid by the Collector of taxes out of the taxes collected on property belonging to such estate, and such payment shall be deducted from said taxes by said Collector and reported to the Comptroller.

It shall be the further duty of such person to aid in every possible way in the collection of such taxes.

It shall be the duty of the County Judge of said county upon his own motion or petition of such appointee of said Comptroller, to appoint an administrator of every estate subject to taxation under the provisions of this chapter where no application for letters testamentary or of administration thereon is made within three (3) months after the death of the person owning such estate taxable hereunder. The person appointed by the said Comptroller may represent the State in any proceeding necessary under the provisions of this chapter to enforce the collection of such taxes but without other compensation than as provided in his original employment. (Acts 1907, p. 496; Act March 30, 1917, Ch. 166, Sec. 1.)

ART. 7492. *Appraisers appointed; notice to be given, etc.*—Said tax shall be assessed upon the actual or market value of the property. The judge of the county court having jurisdiction of the estate of the decedent shall, as often as and whenever occasion may require, appoint two competent disinterested persons as appraisers to fix the value of property subject to said tax. The appraisers, being first sworn, shall forthwith give notice to all persons known to have a claim or interest in the property to be appraised, including the executor, administrator or trustee and the

collector of taxes of the county, of the time and place when they will appraise the same. At such time and place they shall appraise such property at its actual or market value at the time of the death of the decedent, and shall thereupon make report thereof in writing to said county judge, who shall file such report. Each appraiser shall be paid, on the certificate of the county judge, two dollars for each day employed in such appraisal, together with his actual necessary expenses incurred therein, which payments shall be made by the collector of taxes out of any moneys in his hands received under this chapter; provided, however, that upon the agreement of the parties interested to dispense with the appointment of appraisers, the county judge shall himself appraise the property and make and file a report thereof. If the same decedent shall leave property subject to this tax to more than one person, a separate appraisal and report shall be made for the property of each person.

ART. 7493. *County judge to regulate tax.*—Immediately upon the filing of the report of the appraisement, the county judge shall calculate and determine the amount of tax due on such property under this chapter, and shall in writing certify such amount to the collector of taxes, to the executor, administrator or trustee, and to the person to whom or for whose use the property passes. Said tax shall be a lien upon such property from the death of the decedent until paid, and shall bear interest from such death until paid, unless payment shall be made within six months after such death, in which case no interest shall be charged.

Art. 7494. *Property withheld until tax paid.*—If such property be in the form of money, the executor, administrator or trustee shall deduct the amount of the tax therefrom before paying it to the party entitled thereto; if it be not in the form of money, he shall withhold the property until the payment by such party of the amount of tax; in any case the executor, administrator or trustee shall be liable for the amount of the tax and shall have the right, in case of neglect or refusal after due notice of the party entitled to the property to pay such amount, to sell, at public sale, after due notice to such party, the property, or so much thereof as may be necessary. Out of the sum realized on such sale, the executor, administrator or trustee shall deduct the amount of the tax and the expenses of the sale, and shall pay the balance to the party entitled thereto.

Art. 7495. *Tax charged on real estate, when.*—Whenever any legacy subject to said tax shall be charged upon or payable out of real estate, the heir or devisee, before paying the legacy, shall deduct the amount of the tax therefrom, and pay the amount so deducted to the executor, administrator or trustee; the amount of the tax shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor or trustee in the same manner as the payment of the legacy itself could be enforced.

Art. 7496. *Tax paid, when.*—All taxes received under this act by any executor, administrator or trustee, shall be paid by him within thirty days thereafter to the collector of taxes of the county whose county court has jurisdiction of the estate of the decedent.

Upon such payment, the collector shall make duplicate receipts thereof; he shall deliver one to the party making payment, the other he shall send to the comptroller of public accounts, who shall charge the collector with the amount thereof, and shall countersign and affix his seal of office to such receipt and transmit same to the party making payment.

ART. 7497. *Collector to sue for, when.*—In case such tax shall not be paid to the collector of taxes within six months after the county judge has notified the amount thereof as hereinbefore provided, the collector shall commence an action to recover the amount of such tax against the executor, administrator or trustee, and the party to whom or for whose use the property has passed; provided, that the county judge may by certificate to the collector extend such time of payment whenever the circumstances of the case require.

ART. 7498. *Collector pays to state treasurer.*—The collector of taxes of each county shall, on or before the fifteenth day of each month, pay to the state treasurer all taxes received by him under this law before the first day of that month, deducting therefrom all lawful disbursements made by him under this act, and also his compensation at the rate of one per cent of all taxes collected under this act.

ART. 7499. *Tax deposited to credit of general fund.*—The moneys received by the state treasurer under this chapter shall be deposited in the state treasury to the credit of the fund now there existing and known as the general revenue fund.

ART. 7500. *Tax refunded, when.*—Whenever any debts shall be proven against the estate of a decedent after the distribution of property on which the tax has been paid, and a refund is made by the distributee, a due proportion of the tax so paid shall be repaid to him by the executor, administrator or trustee, if still in his hands, or by the collector of taxes, if it has been paid to him. The collector shall pay such sums upon the order of the county judge out of any money in his possession under this law; and the comptroller of public accounts shall credit the collector with all sums so paid out by him.

ART. 7501. *Final account not allowed until tax is paid.*—No final account of an executor, administrator or trustee shall be allowed by the county judge, unless such account shows and said judge finds that all taxes imposed under this law on any property or interest passing through his hands as such have been paid; and the receipt of the collector of taxes for such taxes shall be the proper voucher for such payment.

ART. 7502. *Appointment of administrator dispensed with.*—If for any reason administration of the estate of a decedent, leaving property subject to taxation under this law, shall not be necessary in this state, except in order to carry out the provisions of this chapter, it shall be in the discretion of the county judge, upon the filing of a satisfactory inventory of the taxable property by the trustee or owner, to dispense with the appointment of an administrator. Upon the filing of such inventory, the appraisement and other proceedings required by this chapter shall be had as in other cases.